IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 25, 2001 Session

STATE OF TENNESSEE v. CLAUDE RONNIE MORRISON

Direct Appeal from the Criminal Court for Sullivan County
No. S42,877 Phyllis H. Miller, Judge

No. E2000-02048-CCA-R3-CD
August 7, 2001

The defendant, Claude Ronnie Morrison, was indicted by the Sullivan County Grand Jury for solicitation to commit especially aggravated kidnapping, Tenn. Code Ann. § 39-13-305, a Class C felony. He subsequently entered a "best interest" plea to the charge. The terms of the plea agreement provided that Defendant would receive a sentence of three years and, following a sentencing hearing, the trial court sentenced Defendant as a Range I standard offender to a term of three years in the Tennessee Department of Correction. On appeal, Defendant challenges the trial court's denial of probation. After a review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed.

THOMAS T. WOODALL, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JERRY L. SMITH, J., joined.

Raymond C. Conkin, Jr., Kingsport, Tennessee, for the appellant, Claude Ronnie Morrison.

Paul G. Summers, Attorney General and Reporter; Angele M. Gregory, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Barry P. Staubus, Assistant District Attorney General; for the appellee, State of Tennessee.

OPINION

I. Factual Background

According to the probation report submitted at Defendant's sentencing hearing, on March 10, 1999, Defendant contacted a known police informant for assistance in soliciting someone to confine his 61-year-old ex-wife against her will and inflict serious bodily injury upon her. The informant subsequently contacted Charles Scott, an undercover agent with the Tennessee Bureau of Investigation, who posed as the would-be attacker. Scott negotiated with Defendant on four separate occasions, all of which were tape recorded. Transcripts were prepared and introduced as an exhibit during the sentencing hearing. During the course of these meetings, Scott obtained from Defendant

one thousand dollars (as a down payment on the agreed-upon fee of six thousand dollars for committing the crime), a photograph of the intended victim, and a hand-drawn map of the interior of her residence.

At the preliminary hearing, TBI agent Scott testified that Defendant initially told him that "he wasn't wanting to hire anyone to do anything, he was wanting to buy information, that when he heard that his wife had been messed up, then, he would pay for that information." Thereafter, Scott and Defendant discussed in some detail what Defendant wanted Scott to do. Among other things, Defendant wanted his ex-wife "beat up," her face disfigured, and her jewelry taken. Defendant specified that he wanted the assault to look like a robbery, and then talked with Scott about the best time to accomplish the job, the security guard's schedule, and whether Scott had to worry about the neighbors or an alarm system in the house. A transcript of the conversation between Defendant and Agent Scott on March 22, 1999 reveals that the following colloquy occurred:

> Scott: What about . . . what do you think about me burning the place down? Just not to leave no f—in' evidence period?
>
> Defendant: Well I don't know. I tell you, it don't make no difference to me, I don't give a shit.
>
> * * *
>
> Scott: Yeah. I know he said something about f—ing her face up with a razor blade?
>
> Defendant: Yeah, I'd just beat the shit out of her and everything . . . f— her nose up . . .
>
> Scott: I thought about putting a little acid . . . just splashing her face with f—ing acid and that'll f—in' deform her for good.
>
> Defendant: That'll be all right. I don't give a shit what you do.

The next day Defendant and Agent Scott had another conversation, during which Defendant instructed Scott to say "Brummit said . . . [this or that]" as he beat up the victim. Defendant told Scott that he wanted to make it appear as though a man by that name who was dating the victim at that time was involved in planning the assault. Toward the conclusion of the conversation, Defendant said that he would "like to see the bitch in a wheel chair . . . [that's] what I'd like to see." When Scott warned Defendant that he "might have to kill the bitch" if she "put up resistance," Defendant laughingly replied, "I don't give a damn."

On March 25, 1999, Agent Scott met with Defendant again. Scott brought photographs of Defendant's ex-wife which made it appear as though she had suffered serious injuries to her face, and then demanded the five thousand dollars Defendant had promised him. Defendant claimed that

he was "not interested" and did not believe Scott. Scott told Defendant that he would wait at a place he called the "convention center" and for Defendant to bring him his money within twenty-five minutes. Defendant never appeared.

Defendant was subsequently indicted for solicitation to commit especially aggravated kidnapping and responded by entering an "Alford," or best interest guilty plea, wherein he agreed to a sentence of three years. Eddie Williams and Charles Hunt, two men who have known Defendant for most of their lives, testified at the sentencing hearing as to Defendant's good character, honesty, and trustworthiness. Williams testified that Defendant had become irritable after he was diagnosed with colon cancer, but an operation to remove the cancer had since improved his attitude. Hunt testified that Defendant was a law-abiding citizen and that he was surprised by the current charges against him. On cross-examination, both witnesses confessed that they were unaware Defendant had been convicted in 1979 for public drunkenness and carrying firearms, they did not know the reasons for Defendant's four failed marriages, and they believed that his previous alcohol problem had been "straightened out." At the conclusion of the hearing, the trial judge denied Defendant's request for probation and ordered him to serve his entire sentence in the Department of Correction.

II. Analysis

Defendant contends that the trial court erred by denying him probation or other form of alternative sentencing. Specifically, he argues that the trial court improperly applied and weighed the enhancement and mitigating factors and, further, that his incarceration violates the sentencing considerations as set out in Tenn. Code Ann. § 40-35-103. The State responds that the trial court considered the proper factors and adequately noted its findings on the record. Moreover, the State urges that even though the trial court chose to consider irrelevant statutory enhancement and mitigating factors in making its determination regarding alternative sentencing, the trial court's sentence is nevertheless proper because it did not base its ultimate decision on those factors.

Our review of a trial judge's sentencing determination is defined by statute. The Criminal Sentencing Reform Act of 1989 provides that when reviewing the manner of service of a sentence, including the grant or denial of probation, the appellate court shall conduct a de novo review on the record with the presumption that the determinations made by the court from which the appeal is taken are correct. Tenn. Code Ann. § 40-35-401(d) (1997). That presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). Because the record shows that the trial judge considered the sentencing principles as well as the relevant facts and circumstances in this case but misapplied one enhancement factor, we review its determination concerning the manner of service of Defendant's sentence without a presumption of correctness. In our review, we must consider all the evidence, the presentence report, the statutory sentencing principles, counsels' arguments, appellant's statements, the nature and characteristics of the criminal conduct, and the potential for rehabilitation or treatment. Id.

As a preliminary matter, we address the State's comment that statutory enhancement and mitigating factors may be used only to determine the length of a defendant's sentence and are not relevant for purposes of determining manner of service. Prior decisions of this Court reveal a split of authority concerning this precise issue. See State v. Jesse Cleo Minor, No. M1998-00424-CCA-R3-CD, 1999 WL 1179143, Davidson County (Tenn. Crim. App., Nashville, December 15, 1999) no perm. to app. filed (enhancement/mitigating factors pertain to length of sentence and not denial of probation); Cf. State v. Robert D. Ring, No. E1999-02088-CCA-R3-CD, 2001 WL 201819, Sullivan County (Tenn. Crim. App., Knoxville, March 1, 2001) no perm. to app. filed (trial court's conclusion that enhancing and mitigating factors are not relevant for consideration concerning alternative sentencing was misplaced); State v. Roger Lee Fleenor, No. 03C01-9611-CR-00400, 1997 WL 621332, Sullivan County (Tenn. Crim. App., Knoxville, October 9, 1997) no perm. to app. filed (when the manner of service of a sentence is challenged on appeal, the reviewing court's de novo review shall examine, inter alia, statutory mitigating or enhancement factors); State v. John P. Pelfrey, No. 01C01-9606-CR-00251, 1997 WL 383149, Wilson County (Tenn. Crim. App., Nashville, July 11, 1997) no perm. to app. filed (enhancement factors are appropriate considerations in determining the manner of service as well as length of sentence). After reconsideration of this issue and a thorough analysis of the applicable statutes and case law, we now hold, consistent with our opinion in Pelfrey, that enhancement and mitigating factors are appropriate considerations in determining manner of service as well as length of sentence. Tennessee Code Annotated section 40-35-210(b) provides the following: "To determine the specific sentence *and the appropriate combination of sentencing alternatives* that shall be imposed on the defendant, the court shall consider [among other things, the] . . . [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114 . . . ." Tenn. Code Ann. § 40-35-210(b)(5) (1997) (emphasis added). The provisions of subsection (b) were designed to permit the court "the greatest latitude in considering *all* available information in imposing the appropriate sentence *and sentence alternative*." Sentencing Commission Comments, Id. § 40-35-210 (emphasis added).

Prior to ordering that Defendant serve his three-year sentence in confinement , the trial court observed that as a Range I, standard offender convicted of a Class C felony, Defendant was presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. See Tenn. Code Ann. § 40-35-102(6) (1997). Determining whether a defendant is entitled to full probation requires a separate inquiry from that of determining whether the defendant is entitled to alternative sentencing. State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995) overruled on other grounds, State v. Hooper, 29 S.W.3d 1 (Tenn. 2000). When a defendant is presumed to be a favorable candidate for alternative sentencing options, the State has the burden of overcoming the presumption by presenting evidence to the contrary. Id. Where a defendant wants to be placed on full probation, the burden shifts to the defendant who must establish his suitability for such sentencing, notwithstanding the statutory presumption regarding alternative sentencing. See Tenn. Code Ann. § 40-35-303(b); State v. Fletcher, 805 S.W.2d 785 (Tenn. Crim. App. 1991). The question is "whether or not the court is satisfied that [probation] will subserve the ends of justice and the best interests of both the public and the defendant." Hooper v. State, 297 S.W.2d 78, 81 (Tenn. 1956). In the instant case, we find that the State submitted sufficient evidence to overcome the

favorable presumption regarding alternative sentencing and also that Defendant failed to establish suitability for probation.

According to statute, a trial court may order that a defendant serve his sentence in confinement if it determines that confinement is necessary to protect society from a defendant who has a history of criminal conduct, is necessary to avoid depreciating the seriousness of the offense, would provide an effective deterrent to others, or that less restrictive measures have frequently, recently and unsuccessfully been applied to the defendant. Tenn. Code Ann. § 40-35-103(1)(A) - (C) (1997). In making its determination, a trial court should consider the defendant's criminal record, his social history, his present physical and mental condition, and his potential for rehabilitation. Stiller v. State, 516 S.W.2d 617 (Tenn. 1974). Lack of truthfulness is probative on the issue of amenability to rehabilitation and is, therefore, also an appropriate factor to consider in granting or denying probation, State v. Neely, 678 S.W.2d 48, 49 (Tenn. 1984), as well as the lack of repentance and remorse. See State v. Pierson, 678 S.W.2d 905 (Tenn. 1984).

Tennessee Code Annotated section 40-35-210 further provides that in determining the appropriate combination of sentencing alternatives to be imposed on the defendant, the court shall consider the evidence presented at the trial and the sentencing hearing, the information contained in the presentence report, the principles of sentencing and arguments as to sentencing alternatives, the nature and characteristics of the criminal conduct in issue, evidence and information concerning the applicable enhancement and mitigating factors, and statements from the defendant. Tenn. Code Ann. § 40-35-210(b) (1997).

Notwithstanding the statutory presumption which favored granting Defendant alternative sentencing, the trial court found that confinement was necessary in this case to protect the public from a defendant with a history of criminal conduct and to avoid depreciating the seriousness of the offense. The trial court further determined that the nature and circumstances of the offense were "especially violent, horrifying, shocking, reprehensible, offensive, and otherwise of an excessive or exaggerated degree," and that Defendant exhibited a low potential for rehabilitation because he had refused to accept responsibility for his crime and was not truthful in assisting the officers who prepared his pre-sentence report. The trial court found two enhancement factors applicable: (1) "[t]he defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range," and (15) "[t]he defendant . . . used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense," Tenn. Code Ann. § 40-35-114(1), (15) (1997), and decided that no statutory mitigating factors were appropriate but that one non-statutory mitigating factor applied, i.e., excellent work history. The court did not give it much weight, however. Defendant contends and we agree that the record does not support the application of enhancement factor (15). However, the record justifies the trial court's denial of probation or other form of alternative sentencing based on other considerations.

Regarding the application of enhancement factors in Defendant's case, the record shows that the trial court applied factor (1), concerning Defendant's history of criminal behavior, based on his 1979 convictions for possessing firearms and public drunkenness and on a statement from the victim,

Defendant's ex-wife, which attested to a pattern of physical and emotional abuse from the beginning of their marriage. The victim claimed that Defendant had beat her on numerous prior occasions and also threatened to kill her. Based on these facts, we find no error in the trial court's application of enhancement factor (1).

Enhancement factor (15) is a different matter. The trial court found that Defendant used a "special skill" obtained through his occupation which facilitated the commission and fulfillment of the offense charged. Prior to owning/operating a used car lot, Defendant worked as a law enforcement officer. The court observed that Defendant's law enforcement experience permitted him to know the informant personally and also trust him to commit the crime. The trial court also found that Defendant's knowledge of the layout of the victim's house and other personal aspects of her life was enhanced by his former career in law enforcement and facilitated the commission of the offense.

We disagree with the trial court's analysis, finding that a stronger relationship between a "skill" and the commission of a crime is necessary for application of that factor. The plain language of the statute requires a "significant relationship" between the application of the skill and the facilitation of the crime. For example, the enhancement factor may be properly applied when a respiratory therapy technician uses his position in the medical field and relationship to medical professionals and pharmacists to fraudulently obtain prescription-only drugs from pharmacies. See State v. Ronald Wayne Ashby, No. M1999-01247-CCA-R3-CD, 2000 WL 995256 at *5, Lincoln County (Tenn. Crim. App., Nashville, July 12, 2000) perm. to app. denied (Tenn. 2001) (citing State v. Cummings, 868 S.W.2d 661 (Tenn. Crim. App. 1992)). The factor may also be appropriate when an office manager and bookkeeper uses her position with an employer to embezzle funds and/or cover the crime. Id. (citations omitted); Cf. State v. Phillip Drew Cantwell, No. 01C01-9701-CC-00035, 1998 WL 792220, Maury County (Tenn. Crim. App., Nashville, Nov. 16, 1998) no perm. to app. filed (when the owner of an industrial business discharged waste in contravention of environmental laws, the defendant's possession of "specialized knowledge regarding the *manufacture* of chemicals" did not indicate exercise of a "skill so specialized as to facilitate the commission of acts of environmental vandalism" (emphasis added)).

In the instant case, any correlation between Defendant's criminal conduct and his vocation is quite minimal. His knowledge of the victim's house and neighborhood were obtained through his personal relationship with her and could have been easily duplicated by any friend or acquaintance not in law enforcement. Although Defendant, while working as a police officer, had met the informant who ostensibly would arrange for the commission of the crime, the two character witnesses who testified at the sentencing hearing claimed that the informant's status was common knowledge in the community. This being the sole tenuous link between Defendant's former occupation and facilitation of the crime, we find that factor (15) is not applicable.

As previously mentioned, the trial judge also ordered confinement to avoid depreciating the seriousness of the offense and because the nature and circumstances of the offense were "especially violent, horrifying, shocking, reprehensible, offensive, and otherwise of an excessive or exaggerated

degree." The trial court also determined that Defendant exhibited a low potential for rehabilitation based on the fact that he had refused to accept responsibility for his crime, exhibited no remorse, and was not truthful when assisting the officers who prepared his pre-sentence report. After a review of the record, we find the trial court's denial of probation or other form of alternative sentencing was proper based on these considerations.

Clearly, the offense was shocking, reprehensible, and of an excessive degree. Defendant's goal was for his ex-wife to spend the remainder of her life as the tragic, severely disabled and disfigured victim of a vicious assault. Add to this the cavalier attitude displayed by Defendant while he discussed her possible murder and disfigurement by acid, and his intention to place blame for this heinous crime on an innocent person, the denial of probation or other form of alternative sentencing becomes highly appropriate. As noted above, when probation is denied because of the nature of the offense, the criminal act must be aptly described as "especially horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree," and it must be clear that "the nature of the offense, as committed, outweighed all other factors . . . which might be favorable to a grant of probation." State v. Travis, 622 S.W.2d 529, 534 (Tenn. 1981); State v. Byrd, 861 S.W.2d 377, 380 (Tenn. Crim. App. 1993). The trial court found that this "especially horrifying" criteria was satisfied. We agree and additionally find that the barbarous circumstances of the offense outweighed all other factors which might have favored granting Defendant probation. As a result, incarceration for three years is also necessary and proper to avoid depreciating the seriousness of the offense.

We also concur with the trial court's determination that Defendant's behavior fails to indicate he is amenable to rehabilitation. Rehabilitation stands a greater chance of success when a defendant accepts *some* responsibility for the criminal offense to which he pled guilty. Defendant's presentence report contains the following statement from him: "This offense is totally out of character for me. I believe injury and sickness caused me to be talked into being a part of this offense." However, the only reference in Defendant's medical records to a psychological disorder is found in a one-paragraph letter from a psychiatrist which stated that "his diagnoses are Depressive Disorder NOS, Panic Disorder without Agoraphobia, Alcohol Dependence in partial remission and Personality Disorder," without any further explanation. This statement is not sufficient to show that Defendant was in such a vulnerable mental state that he could be "talked into being a part of this offense." Since the physical problems described in Defendant's medical records similarly fail to provide evidence to support this claim, and he further neglected to offer any proof concerning *who* allegedly "talked him into being a part of this offense," we are unpersuaded that his medical conditions caused his criminal conduct. Moreover, the proof indicates that Defendant was not completely truthful concerning his financial status nor was he forthcoming with various tax records requested by the State. Lack of truthfulness is probative on the issue of amenability to rehabilitation. State v. Neely, 678 S.W.2d 48, 49 (Tenn. 1984)

For the forgoing reasons, we find that the evidence presented by the State successfully rebutted the statutory presumption that Defendant was a favorable candidate for alternative sentencing and, further, that Defendant failed to establish his suitability for probation. In this case, we agree with the trial court that confinement, not release into the community, would serve "the ends

of justice and the best interest of both the public and [D]efendant." Hooper v. State, 297 S.W.2d 78, 81 (Tenn. 1956). Accordingly, the trial court did not err by refusing to grant probation, and Defendant is not entitled to relief on this issue.

III. Conclusion

The trial court's denial of Defendant's probation or other form of alternative sentencing is AFFIRMED.

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THOMAS T. WOODALL, JUDGE